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# FINDING FAIRNESS IN U.S. FAMILY LAW

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*Family law's visions of justice within the family regarding familial property are explored in terms of communal, equalitarian and equitable principles. Communal principles emphasize the family unit and implicitly assumes individuals' cooperation and common interests. Equality confers identical rights; family members "share and share alike" in family property. Equity underlies rules making entitlements dependent upon contributions, such as requiring proof of individuals' efforts toward acquiring family property. In recent years, equality and equity have found greater expression as family law increasingly addresses individual rights, yet communal notions persist, so that the three principles mix and fuse in family law.*

## FINDING FAIRNESS IN U. S. FAMILY LAW

Within an assortment of marriage, divorce, property, inheritance and tax laws and policies that make up "family law" in the United States can be found rules pertaining to the ownership and transfers of those property and economic interests available to various family members *vis-a-vis* their relationship status. Whereas these rules often have been a subject in discussions of economic justice between socio-economic classes, notably less attention has been given to the topic of this paper: the principles of justice in these rules aimed at the intrafamilial level. Despite its lower profile, the latter topic is no less important than the former.

The visions of fairness embodied in the rules coming to bear on family members' property and economic interests have both direct and indirect social and economic consequences. The direct consequences occur for those who become subject to the rules, varying from equal outcomes for all family members to providing advantages for some family members to other members' disadvantage. Indirectly, these rules lend legitimacy to particular social definitions of fairness, the family, spousal roles, gender roles and the nature of the relationships between family members that the rules presuppose. Thus, the indirect consequences are broader and may be more important than the direct consequences. In the words of sociology of law scholar Mary Ann Glendon (1989:311, *emphasis added*):

A country's law, like its art, religion, economy, and history, both affects and is affected by the culture in which it arises, and *though the effects of law are modest, they are not always trivial...*Many of the legal trends [in family law] are tributaries to the formation of the cultural schemes of meaning that determine to a great extent how we experience, remember, imagine, or project the basic events and relationships of our lives.

First I will present contrasting principles of justice and how they translate into family law's treatment of the family. Then, I will focus upon selected aspects of marital property law, divorce law, inheritance law and tax law, in order to discuss how fairness principles find expression in these rules, and some of the direct and indirect consequences of that expression. This discussion will include a look at some historical trends and innovations in these rules which reveal intriguing patterns of change in notions of fairness, especially in the rules dealing with who can claim what among family members' possessions when the family is dissolved through divorce or death.

## Principles of Justice

Principles of justice operating in family law and policy tend to differ in terms of how the family collective is treated: as a singularity, or as an aggregate of separate individuals. The first type of treatment signifies a *communal* principle wherein ownership resides in the collective and each family member's access to family resources is worked out within the family. The latter type of treatment can come in the form either of (a) the principal of *equality* whereby every family member is seen as having the same status and is treated the same; or (b) an *equitable* principle, which involves a type of exchange scheme basing entitlements to family resources upon each family member's individual contributions to the collective. While these represent analytical distinctions, they often correspond to distinctly different rules. However, in family law we can find all of these principles, sometimes coalescing and sometimes creating tensions that contribute to both interstate variation<sup>1</sup> and changes in the rules over time.

Communal principles have had a long history in American law. Due to the publicity given some California celebrities' property disputes in divorce and "palimony" suits in recent decades, most people have heard of *community property*, a concept from the Spanish law tradition. According to this concept, marriage creates a community estate in which husband and wife share an indivisible interest; property acquired during the marriage by either party, with some exceptions for inherited property and such, automatically belongs to this estate. Thus, the marital couple is treated as a singularity, though not the larger family group, with rules that essentially disregard the fact that the marital unit has two people, each of whom could be treated separately, and each of whom may have independent different interests.

When someone leaves a group that owns property communally, ownership of the property remains with the group. Hence, adhering

to pure communal principles becomes problematic for a two-person group if it dissolves and the individuals go their separate ways; no rules suggest what becomes of the communally owned property. For example, dividing the communal property in half and giving a half to each person, by definition, invokes the principle of equality. Therefore, it should not be surprising that a body of law that tries to serve both intact families and address situations of marital dissolution embodies more than one type of fairness principle.

Colonial common law adapted from England also held strong communal principles: through marriage two people became one, but more significantly, the family collective tended to be more important than its individual members. For example, colonial inheritance law largely avoided dividing up family property, in part, through trusts, usufruct rules and life estate provisions that did not give individuals the rights to use up, alter or dispose of property while benefiting from its use or income (Blumenfeld 1974; Glendon 1989; Hill 1995). In this way, individuals had some economic support while the more important property rights remained with the family collective. This communal treatment of the family was easier to maintain than that of marital property since the family collective could continue for generations.

A third way that early family law adhered to a communal principle was to recognize the family as a special type of collective that has legal rights, privileges and responsibilities, but to treat particular aspects of relationships among family members as phenomena for which outside governance is neither needed nor desired. Thus, the family was deemed a “private sphere” and family law’s intrafamilial property rules either explicitly gave, or through omission implicitly left, much decision making to the family members to work out, themselves. In early law this approach was most evident in the vast extent to which family law did not provide rules for how to handle intrafamily matters. For example, law did not control whether children went to school or worked in factories, or boarders were taken into the family household, or whether

buying a milk cow was more important than buying new shoes for the children when the family couldn't afford both, and so on. This mode of communal principle in family law has dwindled, most notably in recent decades, as law and policy increasingly have extended into many areas of people's lives.

In recent decades there have emerged new legal images of the family which, in varying degrees, emphasize the individual family members more than the unitary aspect of the family (Glendon 1989; Hill 1990; Jacob 1988; Shammas, Salmon & Dahlin 1987). The new rules have not made family law entirely individualistic; rather, it continues to exhibit a tension between the idea of family as involving cooperation and a community of interest, on the one hand, and the recognition of the separate and equal individuality of the family members, on the other (Glendon 1989:143-7). Nonetheless, this shift in balance toward rules that support the latter treatment of the family represents a growing dominance of the principles of equality and equity in family law.

It is ironic that the principle of equality did not dominate in early U. S. family law, given the egalitarian ideals and notion of rights as *individual* rights that are championed in documents of the country's founding. However, equality did supplant some of the borrowed English common law practices early in the country's history, an example being the states' abandonment of primogeniture rules of inheritance that gave the oldest son all or most of the family property, in favor of rules that divided the property equally among the children. In this example the principle of equality overcame tradition more than it replaced other fairness principles, but gradually family law's equality principles have grown in prominence. Equalitarian views of fairness that are expressed in specific rules of family law will be discussed in later sections of this paper.

Evidence of equitable principles in family law has had the most interesting pattern of emergence, growth and co-existence with

other principles. As an example, equity<sup>2</sup> provides the basis for treating property acquired during a marriage as belonging to the husband when his wife is a full-time homemaker without an independent income. Actually, the wife's disadvantage in this example does not derive from the principle of equity, by itself, but in its combination with the logic used in calculating "inputs" (contributions to the family economy) in order to determine "outcomes" (entitlements to family assets) under equitable standards. The logic used in the example given is that by not having her own income during the life of the marriage the wife is a dependent who does nothing to contribute to the accumulation of family assets. Hence, calculations result in giving the wife no credit and her husband credit for one hundred percent of the contributions, thereby entitling the wife to nothing and her husband to everything. The intricacies of equitable principles, the various ways they find expression in family law and the consequences of that expression will be discussed in more depth later in this paper.

### **Fairness and Views of the Family**

In terms of intrafamilial fairness, the consequences of communal, equalitarian and equitable principles often depend on law and policy definitions of who constitutes the family. Obviously, an individual who is not considered part of the family according to family property rules is likely to be omitted from sharing in family property and economic interests. If an omitted person happens to be related to one or more of the included family members, either by blood or through license, sacrament, pledge, or special social bond, then the property rules might seem unfair, especially if there are salient competing rules or ideals that do include the omitted person as family with rights to family property. A historical review clearly shows that the definition of family has not been constant in family law, especially for inheritance (Glendon 1989; Hill 1995; Jacob 1988).

From colonial times to the late 1800s the dominant definition of family in law was the lineal family, or the bloodline. For example, two hundred years ago a spouse was not even considered an heir under inheritance law (Ditz 1986). Rather, the idea was to keep family property within the bloodline and preserve it so that in each successive generation the family as a whole could continue to benefit from it. Under this communal principle of justice, in which the family unit is more important than the individuals in it, excluding a spouse was considered fair for two main reasons. First, social norms and ideals largely accepted that *family* meant *lineage*. Second, it was understood that maintaining family assets was vital to economic survival in a largely agrarian economy; therefore, a spouse should not jeopardize the family by taking family assets.

In reality these laws must have seemed unfair to some, especially to those surviving spouses whose welfare suddenly seemed to depend on the benevolence of their children, or even unrelated others, like in-laws or step-children who were legal heirs of the decedent, but not related to the surviving spouse by blood or in law. Because U. S. law also was highly patriarchal, it tended to favor males in property matters; hence, the unfortunate surviving spouse was most likely to be a woman. A sense of inheritance law's unfairness to women, and the view that the growing ideal of companionate marriage established a kinship-like bond between husband and wife (Carter 1988), were involved in the move to make the spouse an heir as part of the Married Women's Property Acts of the mid- to late-1800s.

Other influences that led to including the spouse in the definition of family for inheritance were the growing emphasis on equality as the ideal principle of justice, and changes in the nature of the country's economy. By the end of the 1800s legal devices, like trusts and life estates, that helped maintain family property intact became obstacles to participating in an increasingly fast-paced industrial economy (Jacob 1988), so inheritance rules that did not encumber family property grew in importance. The resulting new rules tended to distribute outright ownership of family property in

equal shares among members of the family, which now was defined to include the surviving spouse. Some states applied the notion of equality so strongly that they adopted intestate succession laws—rules which operate when there is no Will—that explicitly either categorized spouse and children together to “share and share alike”, or listed a spouse’s distribution as “a child’s share” (Shammas et. al 1985; Martindale-Hubbell 1961).

Although the legal family for inheritance now included the spouse, traditional regard for the lineal family was not easily discarded: well into the 1900s most states’ intestate laws required a surviving spouse to divide property with children, parents and sometimes siblings of the deceased spouse (Carter 1988; Hill 1995; Shammas et. al 1985). Thus, inheritance law came out of the nineteenth century with a view of the family as an extended family that now included the spouse. Gradually over the twentieth century more and more areas of family law have postulated a definition of the family that is marriage-centered and consists of the conjugal unit of father, mother and their children (Glendon 1989). For inheritance this meant that rules began to emphasize that when there was a surviving spouse and/or a lineal descendent, then no other family members should expect to share in the estate.

In contrast to inheritance law, by the turn of the twentieth century property rules in domestic relations law—that is, marriage, marital property, divorce and child custody laws—already held a marriage-centered view of the family. This is demonstrated by the fact that family property rules for dissolution of marriage by divorce did not suggest transferring family property to children, grandchildren, parents, collateral kin within the bloodline or other family members of the divorcing individuals, as would have been consistent with most then-existing rules for marriages that ended through death of a spouse. Rather, domestic relations property rules focused on how to divide property between the divorcing individuals. Children were included in the property rules’ view of the family only when they were minors and/or legally-recognized dependents, in which



case rules might entitle the custodial spouse to more of the family assets than if there were no dependent children in the family.

Until the “tender years” doctrine that children need to be with their mother became prevalent, divorce law’s marriage-centered property rules and law’s paternalistic view of the family meant that the father was entitled to both the children (his lineage) and the family property (Friedman 1995; Glendon 1989; Grossberg 1985; Mason 1994; Smart and Sevenhuijsen 1989; Warshak 1992). Except from the perspective of the women’s movement, this was deemed fair because in most cases the husband was considered head of the household by law; he held title to the family property; he was seen as contributing the most to providing, maintaining or accumulating family property through inheritance and participation in economic activities; and he had both a right to benefit from his children’s labor and a stake in their future as heirs to “his” (the family) property.

This reasoning included an equitable principle in its arguments about the relative contributions of husband and wife to family property. In an agrarian society these fairness claims also had the weight of the communal principal of keeping the property intact for the benefit of the family as a whole, as under inheritance law. However, as trends in the nation’s industrializing economy led to the situation where most families’ assets stemmed from wages earned outside the home, the reasoning behind these rules that served to benefit men and disadvantage women was based more and more on the principle of equity regarding the relative contributions of husband and wife, as described in the example of this principle offered in the previous section.

Trends in the way the property rules of inheritance law and domestic relations law view the family have converged in recent decades in response to twentieth century social, demographic and economic change (Glendon 1989; Jacob 1988; Martindale-Hubbell 1961, 1997). Overall, the property rules in family law have become so focused on spousal entitlements that the larger definition of the

family seems peripheral in them. In the case of inheritance both custom and law favor the surviving spouse over children of the marriage and other blood relatives of the decedent (Glendon 1989; Hill 1995). In divorce law the family assets are regarded as “marital property” belonging to both husband and wife, regardless of which of them holds the title (Jacob 1988). The overwhelming emphasis on the marital relationship in family law’s property rules seems to suggest that when a spouse benefits, the family benefits.

Meanwhile, the expanding influences of individualism and egalitarianism, the entry of women into the labor force and the increase in divorce all have served to temper the communal principle that gave emphasis to the unity of the married couple (Glendon 1989:94). As a consequence, the new marital property rules blend communal and equalitarian principles in a tendency to treat marriage as a symmetrical economic partnership in which both partners are entitled to share equally in the partnership’s earnings, savings, investments and future economic interests (Glendon 1989; Hill 1995; Jacob 1988). Also influencing these rules has been a largely unconscious tendency for law and policy makers to adopt rules that disassemble the family collective into its component parts and treat family members as separate and independent (Glendon 1989:295), which advances individualistic views. As mentioned in the previous section, the preponderance of individualism tends to encourage intrafamilial property rules based on principles of equality and equity because these principles provide formulas for determining individual entitlements to the pool of family resources, whereas a communal treatment of the family as a singularity leaves the family members to sort things out for themselves.

In the remainder of this paper I will give examples of how communal, equalitarian and equitable principles of intrafamilial fairness are embodied in and operate through some of the rules found in family law, highlight some of the consequences of these laws, and discuss the ways in which they may be considered fair

and unfair from various perspectives. After focusing on selected property rules of marital property and divorce law, I will show how the mixing of principles is most evident in inheritance law.

### **Property and Fairness in Marriage and Divorce**

As the second half of the twentieth century began family law contained very few rules for determining intrafamilial property interests in the ongoing marriage. Instead, the communal principle of the family as a private sphere was emphasized. However, law increasingly has been asked to address circumstances where a husband's and wife's separate interests in family property become salient, most notably when marriage ends. As law has done so, the number of intrafamilial property rules based on equal and equitable principles has increased in family law. Also, after divorce had become common and equal rights measures gave women more leverage, family law began including rules to influence married couples to handle their property during marriage in ways consistent with divorce law's marital property rules. As a consequence, trends in divorce law and the intrafamilial fairness principles embodied in them have had a large effect on family law's approach to marital property.

At mid-century, divorce law's marital property rules differed between community property and separate property systems, each essentially operating on different principles of fairness. Equality tended to dominate in community property law in the assumption that at any point in a marriage each spouse owns a present, vested, and equal one-half interest in all property acquired during the marriage by either party, except for property one party had acquired through inheritance (Carter 1988; Lynn 1983). Under separate property law often it was assumed that whoever held legal title to the property was the owner. For untitled and jointly-held property, ownership usually was considered to be with the person providing the means for acquiring it, the notion of "means" almost always being interpreted as "income" (Hill 1990). Thus, separate property

law adhered to an equitable principle, making entitlement to assets dependent on the relative income contributions of the spouses. Under the predominance of patriarchy, the new ideal of family in which a husband is the sole wage-earner and a wife is a full-time homemaker, and the reality that a wife's income usually was much smaller than her husband's, the situation until recent decades was one in which wives in community property states tended to fare better in property settlements than those in separate property states when a marriage ended.

Differences between community property and separate property states have been waning over the twentieth century, particularly in recent decades (Glendon 1989; Jacob 1988; Hill 1995; Shammas et. al 1987). Influencing this trend has been the National Council of Commissioners on Uniform State Laws (NCCUSL), an organization of law professionals who construct, publish and advocate model laws and uniform codes that states may adopt, use as guides, or ignore (Averill 1987). In 1970 the NCCUSL first published a Uniform Marriage and Divorce Act (UMDA). The UMDA's suggestions for how to treat marital property in divorces have been adopted to varying degrees by the states (Jacob 1988). Although few states' marital property laws expressly or implicitly counted domestic labor—child care, housework, and such—as an economic contribution to the marriage, in the early 1960s President Kennedy's Commission on the Status of Women recommended counting a wife's homemaking contribution as equal to her husband's wages (1963:18):

Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living.

Yet, members of NCCUSL thought that insisting on an equal 50-50 split of marital property at divorce would be too revolutionary to be acceptable to the states (Jacob 1988:72).

Instead, they proposed wording similar to a rule that had been established a full century earlier, albeit by just two states, Kansas and Oklahoma (Jacob 1988:115), which provided that in property divisions at divorce (*1889 General Statutes of Kansas* §4756):

...[for] such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such a sum as may be just and proper to effect a fair and just division thereof.

A rule giving such wide latitude to the court makes it difficult to know what principles of intrafamilial fairness “may appear just and reasonable”, allowing broad social norms and judicial proclivities to operate to determine intrafamilial fairness. When interpreted as an instruction to presume that the couple have considered their property and economic interests to be a pooled resource to which they are equally entitled, share and share alike, then equalitarian principles are operating and the result is a fifty-fifty split of the household property between husband and wife. When the rules are considered to be instructions to recognize that a wife contributes to the household through performing domestic labor, thereby contributing to the accumulation of household assets, then an equitable view of fairness is being used because the basis of entitlement rests with each individual’s relative contributions.

Some states have adopted new marital property rules explicitly mandating that a homemaker’s non-monetary contributions be counted *the same as* the wage earner’s salary or income (Jacob 1988:2). This directive tends to confound the principles of equity and equality by establishing the equitable presumption that both spouses make contributions to the accumulation of marital assets

(whether by providing material resources, income, domestic labor and/or social and psychological resources), then concluding that the spouses be treated as having equal interests in the marital assets. Strict adherence to equity, however, requires that the respective entitlements of husband and wife be determined by calculating the extent to which each has contributed to, and already has benefited from, the material and non-material marital resources during the life of the marriage—a calculation that would be exceedingly difficult to make, in reality. Nevertheless, indications have been that equity tends to dominate in property settlements at divorce. After studying the spread of no-fault divorce laws, Jacob (1988:167) commented that:

It is an exaggeration to call the new laws egalitarian because most of them urge an equitable rather than an equal distribution of assets. In most courts that is likely to mean that the husband's labor will continue to be valued more highly than the wife's... With a considerable lack of realism, the new laws often presume that women are fully able to earn their own living, even though the labor market continues to pay women less than men and makes it difficult for women to enjoy the same career successes as men.

Overall, state statutes continue to give wide discretion to the courts to determine a fair division of marital property at divorce (Glendon 1989:134), but perhaps the NCCUSL was trying to influence the divorce courts to use the principle of equality when it published the Uniform Marital Property Act in 1983, which states that during the marriage the marital partners are to be considered equal co-owners of all property acquired during the marriage except by gift or inheritance (Glendon 1989:130). Despite highly supportable claims that divorce law treats women unfairly, the present treatment is more equal now than in the past when most intrafamilial property rules in family law ignored the type of non-material contributions

to a marital relationship that women have been called upon to make, overwhelmingly more so than have men.

### **Property and Fairness in Inheritance**

Some of the mixing of fairness principles in rules of intrafamilial property and economic interests occurs because family law actually consists of several separate domains of law within each of the fifty states, with Federal law and policy also coming into play. In areas that affect mostly later-life families there is a large amount of seeming inconsistency, even within a coherent body of law, like inheritance, and sometimes within a single state (Averill 1987; Hill 1995; Martindale-Hubbell 1997). Rules that affect intrafamilial property distributions when a marriage ends through the death of a spouse include the right of testation (to make a Will), successions taxes, states' intestate succession law formulas, and rules that allow the surviving family to partially or wholly override a Will and intestate succession laws. These rules vary between embodying communal principles in which the marital partnership, and sometimes the larger family collective, is treated as a singularity, and rules that emphasize equality and equity in addressing the individual rights of family members.

The dominant overall trend in inheritance has been toward rules that result in "spouse-all" inheritance, that is, the surviving spouse retains all of the family assets and pays no transfer taxes, as if marital property constitutes a community estate (Hill 1995). A supporting argument made for spouse-all inheritance is that the couple's children eventually will receive what remains of the property, either through intestate succession or the surviving parent's Will (Averill 1987; Hill 1995), suggesting a communal view that family property collectively belongs to the nuclear family.

The communal approach that emphasizes spouse-all inheritance also has been encouraged by tax law. Although most people don't make a Will, those who do tend to be influenced by a desire to

avoid estate taxes. Present Federal estate tax law and the overwhelming majority of the states' tax laws exclude virtually all types of property from successions taxes when the spouse is the beneficiary (Hill 1995; Martindale-Hubbell 1997), encouraging spousal bequests by married Will-makers and affecting the distribution formulas in intestate succession laws, given that they are supposed to be consistent with dominant patterns in found in Wills. The Federal spousal exemption came about after decades of attempts to achieve equal treatment of federal estate taxpayers in separate property and community property states. Because widows in community property states already owned half of the marital property, only half the value of marital assets was subject to taxes as estate property. Meanwhile, the tax liability for widows in separate property states usually was for the full value of marital property because the husband held the title and had made the most income during the marriage.

Between 1942 and 1981 the Federal government tried to achieve a more *equal* treatment of widows by periodically adjusting the marital deduction formula—the tax-free amount a spouse in a separate property state could inherit. Along the way, in a response to the family farm crisis, the Revenue Act of 1978 excluded from taxes up to 50% of the value of a farm or other business jointly owned by a husband and wife where the surviving spouse had “materially participated” in the farm or business (Cates & Sussman 1982; Hill 1995; Lynn 1983). Basing entitlements on contributions in this way conforms to *equity*. When the Economic Recovery Tax Act of 1981 finally arrived at an unlimited marital deduction for all states—making spousal inheritance virtually tax-free—a *communal* principle was invoked in arguments for treating married couples as co-owners of the pool of marital property, and recognizing that a surviving spouse did not receive a capital gain when the other died (Hill 1995). States mostly followed the Federal government's lead and all but a handful now allow tax-free inheritance between spouses (Hill 1995).



Whereas all but two states taxed intrafamilial inheritances in 1960, today that number is less than half<sup>3</sup> (Hill 1995). Interestingly, most of the states presently taxing inheritances have political climates that are high in individualism (Elazar 1984; Hill 1990; Zimmerman 1992), a promoter of equality and equity over communal notions of fairness. Taxing intrafamilial inheritance promotes equitable principles in three ways. First, it presumes that the inheritor's gains substantially exceed any contributions he or she may have made toward the accumulation of family property; therefore, the state is justified in taxing the value of the inheritance, like it may tax capital gains. Second, the "relationship discrimination" rule setting the amounts of inheritance exempted from taxes and the rates at which non-exempt portions are taxed is partly based on the following rationale. To the extent family members may have contributed collectively to the accumulation of inheritable property, albeit in different ways, a spouse probably contributed most, followed by the children's contributions, and so on; therefore, it is fair that the beneficiaries' tax liabilities be inversely related to their probable contributions as represented by degree of relationship to the decedent. Hence, a spouse gets the largest exemption and smallest tax rate, children get the second largest exemption and the next higher tax rate, etc. Finally, equity dictates: the more valuable your inheritance, the more tax you must pay.

By giving the spouse preferential tax treatment, tax law helps to reinforce the idea that a widow is entitled to retain the marital property estate according to a communal principle, which is consistent with the overall trend to adopt intestate succession laws that uphold the view that a husband and wife jointly own their family's household resources. Another promoter of spousal inheritance has been the NCCUSL. In its 1969 Uniform Probate Code (UPC) it recommended an intestate succession formula and family protection provisions that would provide spouse-all inheritance when inheritable assets are \$50,000 and under (Hill 1995). Nearly half of the states have adopted laws that would do this (Martindale-Hubbell 1997). Twenty percent of the states also

have adopted a UPC-recommended rule for spouse-all inheritance of unlimited size, as long as all of the decedent's surviving children also are children of the surviving spouse (Hill 1995).

**Figure 1. Rev. UPC (1990), Uniform elective share (property rights of a disinherited spouse)\***

*The surviving spouse of a decedent who dies domiciled in this state has a right of election, against either the will or the intestate share, under the limitations and conditions stated in this act, to take the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:*

*If the decedent and spouse were married to each other: ..... The elective-share percentage is:*

Less than 1 year .....	Supplemental Amount only
1 year but less than 2 years .....	3% of the augmented estate
2 years but less than 3 years .....	6% of the augmented estate
3 years but less than 4 years .....	9% of the augmented estate
4 years but less than 5 years .....	12% of the augmented estate
5 years but less than 6 years .....	15% of the augmented estate
6 years but less than 7 years .....	18% of the augmented estate
7 years but less than 8 years .....	21% of the augmented estate
8 years but less than 9 years .....	24% of the augmented estate
9 years but less than 10 years .....	27% of the augmented estate
10 years but less than 11 years .....	30% of the augmented estate
11 years but less than 12 years .....	34% of the augmented estate
12 years but less than 13 years .....	38% of the augmented estate
13 years but less than 14 years .....	42% of the augmented estate
14 years but less than 15 years .....	46% of the augmented estate
15 years or more .....	50% of the augmented estate

If the decedent and the surviving spouse were married to each other more than once, all periods of marriage to each other are added together for purposes of this subsection. Periods between marriages are not counted.

\*Source: Averill, L. H., Jr. 2001. "Ch. 6, Elective Share of Surviving Spouse and the Augmented Estate Concept," *Uniform Probate Code, 5<sup>th</sup> ed.* St. Paul, MN: West.

The conditional statement of the latter provision suggests that inheritance in reconstituted families is viewed as requiring different fairness principles than when all of the surviving family members are related to each other. In reconstituted families the surviving spouse's interests and feelings of entitlement to household property may conflict with those of the decedent's children; therefore, inheritance rules using a communal view of inheritable property by treating it as marital property could seem very unfair from the children's point of view. This especially may be true in a later-life remarriage that occurs after a long first marriage in which children were reared. Rather than viewing the newly-created family as a cooperative community of interests, its members more likely would hold an equitable view of intrafamilial fairness, that is, a sense of entitlement to family property in relative proportion to the cumulative time, affection, material benefits, and so forth, that each had shared with the decedent in the past.

Although the 1969 UPC recommended reducing the amount of the spousal share when even one of the decedent's children was not related to the surviving spouse, the 1990 Revised Uniform Probate Code (Rev. UPC) proposed a more innovative rule that seemed tailored to later-life remarriages (see Fig. 1). Under this rule the amount of the inheritable property to which a spouse is entitled is based on length of marriage: the longer a couple had been married before one of them died, the more the surviving spouse could claim. In 1992 West Virginia became the first state to adopt this formula when it chose to enact the Rev. UPC. In 1994 Kansas became the second state to adopt the formula; however, unlike West Virginia, Kansas chose not to adopt Rev. UPC and did not change the spousal share for cases where there was no Will. Instead, Kansas chose this formula for its "spousal election" law that sets out how much a surviving spouse can choose to receive from the inheritable property in lieu of what they would get under the Will. By the end of 2001, five other states (Colorado, Minnesota, Montana, North Dakota and South Dakota) had adopted the new formula (Hrenchir 2001). Like West Virginia, each of

these states did so by enacting Rev. UPC (Legal Information Institute 2003), making Kansas the exceptional case.

Because the “supplemental amount” is the first \$50,000 of the decedent’s property, the effect of the rule is that, in many cases, the surviving spouse actually will retain the couple’s assets no matter what the marriage’s duration. However, the rule, itself, represents a shift in underlying fairness principles. For the pioneering state of West Virginia, the new spousal entitlement formula replaced a one-third life estate interest for surviving spouse with full property rights vested in the lineal descendants, that is, the children and/or their offspring. Hence, the new rule connoted a shift away from a communal treatment of the family and made the spousal share more equitable *vis-à-vis* the children’s share. Yet, in the case of Kansas, adopting this provision altered its long-standing rule that a surviving spouse is entitled to at least half of the inheritable assets, except if giving express written consent to accept less. Perhaps it was reasoned that when someone makes a Will totally or partially disinheriting a spouse, it is with good reason<sup>4</sup>. Nevertheless, Kansas’ election law dropped an equalitarian principle of equal sharing between husband and wife, in favor of an equitable one that suggests that spousal entitlements must be “earned” by contributions measured by “time served” in a marriage.

Another innovation recommended by the UPC which has been adopted by nearly half of the states is the family settlement agreement (Hill 1995), which says that a decedent’s survivors—heirs, family, beneficiaries, and “interested parties”—may choose to enter into a mutually approved arrangement for distributing the inheritable assets, even if a Will exists. This rule reinforces a communal principle in treating family property as collectively owned, the family as a singularity whose members have common interests, and family members as able to negotiate their own terms of intrafamilial justice.

Inheritance law's mixing of communal, equalitarian and equitable principles in rules for intrafamilial property arrangements comes from containing the vestiges of inheritance rules fashioned long ago for a different social and economic environment than exists today, along with innovations added to address new circumstances. Because influences like the UPC recommendations (Hill 1995) also combine these principles, it is possible that no one principle will prevail.

## **Conclusion**

A close examination of some of the most consequential property rules in family law reveals that equitable principles of intrafamilial fairness in family property and economic interests appear everywhere: mixed with equalitarian principles in divorce law and in tandem with community principles in inheritance law. Glendon (1989:112) has suggested that in recent decades law and policy makers have been attempting to promote individual independence while simultaneously implementing egalitarian principles and maintaining the ideal of marriage as a "community of life" (1989:112). A natural consequence of this juggling act would be the co-existence in family law of equity, equality and community, respectively, to varying degrees. Further, it could be argued that a mixing of principles also is the inevitable outcome of trying to find general rules to apply to the greatest number and range of particularistic family circumstances that actually exist. Only further study will illuminate what vision of intrafamilial justice will be setting the trend in family law as we move into the next century.

## **Notes**

<sup>1</sup> Interstate variation is possible because nearly all of these rules are found in state-level law and policy, and each state is virtually free to determine its own rules. Occasionally Federal laws and policies will

either stipulate or encourage a particular rule, and there are law organizations offering uniform and model laws that states can adopt, but thus far these influences do not seem to have overcome states' proclivities to "go their own way" (Martindale-Hubbell 1997).

<sup>2</sup> In this paper the meaning of the word *equity* refers to equity theory in the field of social psychology (c.f. Walster, Walter and Berscheid 1978); it is not used to refer to the concept of equity from legal theory. According to social psychology's equity theory people are subscribing to notions of equity when they keep tabs on the ratio of each person's economic, material, social and/or psychological inputs-to-outcomes in order to arrive at a sense of fairness in a relationship.

<sup>3</sup> All but one of the states have a "credit estate tax" provision for offsetting Federal estate taxes, which affects extremely few families since very few estates are large enough to be taxed.

<sup>4</sup> This law may have been needed to deal with the increasing use of living trusts for managing property in later life, which needs more flexibility than a forced share inheritance law provides, for a number of reasons too complex to address here.

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